

ENU MAINIGI (*pro hac vice*)
LESLIE COOPER VIGEN (*pro hac vice*)
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, NW
Washington, DC 20005-5901
Telephone: (202) 434-5000
Facsimile: (202) 434-5029
E-mail: emainigi@wc.com
lvigen@wc.com

JEFFREY E. FAUCETTE (No. 193066)
SKAGGS FAUCETTE LLP
One Embarcadero Center, Suite 500
San Francisco, CA 94111
Telephone: (415) 315-1669
Facsimile: (415) 433-5994
E-mail: jeff@skaggsfaucette.com

Attorneys for Defendant Carrie Tolstedt

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE WELLS FARGO & COMPANY
SHAREHOLDER DERIVATIVE
LITIGATION

Lead Case No. 3:16-CV-05541-JST

**DEFENDANT CARRIE TOLSTEDT'S
NOTICE OF MOTION AND MOTION
TO DISMISS**

Hearing: August 24, 2017
Time: 2:00 p.m.
Place: Courtroom 9
Judge: Honorable Jon S. Tigar

NOTICE OF MOTION AND MOTION TO DISMISS

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on August 24, 2017, at 2:00 p.m., or as soon thereafter as the matter may be heard in the United States District Court for the Northern District of California, San Francisco Courthouse, Courtroom 9, located at 450 Golden Gate Avenue, San Francisco, California, 94102, defendant Carrie Tolstedt, through her undersigned counsel will, and hereby does, move to dismiss the Consolidated Amended Verified Stockholder Derivative Complaint pursuant to Rule 12(b)(6) for failure to state a claim with respect to federal securities causes of action (Counts Five, Six, and Seven), the state-law insider trading causes of action (Counts Three and Eight), and the contribution and indemnification claim (Count Eleven).

The motion is based on this Notice of Motion, the supporting Memorandum of Points and Authorities, the complete files and records in this action, and such additional material and arguments as may be considered at the hearing.

DATED: June 5, 2017

Respectfully submitted,

/s/

JEFFREY E. FAUCETTE
SKAGGS FAUCETTE LLP

WILLIAMS & CONNOLLY LLP
ENU MAINIGI (*pro hac vice*)
LESLIE COOPER VIGEN (*pro hac vice*)

Attorneys for CARRIE TOLSTEDT

CARRIE TOLSTEDT'S MOTION TO DISMISS
LEAD CASE NO. 3:16-CV-05541-JST

1

2 **TABLE OF CONTENTS**

3

INTRODUCTION	1
BACKGROUND	1
ARGUMENT	3
I. LEGAL STANDARDS	4
II. THE SECURITIES CAUSES OF ACTION ARE INADEQUATELY PLEADED	5
A. The Complaint Fails To Allege Multiple Required Elements of a Section 10(b) Claim	5
1. Ms. Tolstedt was the “maker” of only three alleged misstatements	5
2. The Complaint fails to allege an actionable misrepresentation by Ms. Tolstedt	8
3. The Complaint does not support a “strong inference” of scienter as to Ms. Tolstedt’s statements	11
B. Claims under Sections 20A and 29(b) Are Both Derivative of the Securities Fraud Claim and Otherwise Inadequately Pledged	15
1. The Complaint fails to plead an independent violation or contemporaneous trades, as required under Section 20A	15
2. The Complaint fails to plead an independent violation or a contract, as required under Section 29(b)	16
III. THE STATE-LAW CLAIMS SHOULD BE DISMISSED	16
A. The State Law Insider Trading Claims Are Inadequately Pledged	17
1. The Complaint fails to allege scienter, as required under Delaware law	17
2. The California insider trading claim is not pleaded with particularity	19
B. The Contribution and Indemnification Claims Are Not Ripe	20
CONCLUSION	21

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007)	4
<i>Bly-Magee v. California</i> , 236 F.3d 1014 (9th Cir. 2001)	4
<i>Carnegie-Mellon Univ. v. Cohill</i> , 484 U.S. 343 (1988)	17
<i>Cement & Concrete Workers Dist. Council Pension Fund v. Hewlett Packard Co.</i> , 964 F. Supp. 2d 1128 (N.D. Cal. 2013)	5, 8
<i>City of Royal Oak Ret. Sys. v. Juniper Networks, Inc.</i> , 880 F. Supp. 2d 1045 (N.D. Cal. 2012) ...	6
<i>Curry v. Hansen Med., Inc.</i> , No. C 09-5094 CW, 2012 WL 3242447 (N.D. Cal. Aug. 10, 2012) ..	6
<i>Edgar v. MITE Corp.</i> , 457 U.S. 624 (1982)	20
<i>Glazer Capital Mgmt., LP v. Magistri</i> , 549 F.3d 736 (9th Cir. 2008)	14
<i>Glickenhaus & Co. v. Household Int'l, Inc.</i> , 787 F.3d 408 (7th Cir. 2016)	6
<i>Hefler v. Wells Fargo & Co.</i> , Case No. 3:16-cv-05479-JST (N.D. Cal.)	5
<i>In re Am. Apparel, Inc. S'holder Litig.</i> , No. CV 10-06352 MMM, 2013 WL 174119 (C.D. Cal. Jan. 16, 2013)	7
<i>In re Asyst Techs., Inc. Derivative Litig.</i> , No. C-06-04669 EDL, 2008 WL 4891220 (N.D. Cal. Nov. 12, 2008)	16
<i>In re Atmel Corp. Deriv. Litig.</i> , No. C 06-4592 JF (HRL), 2007 WL 2070299 (N.D. Cal. July 16, 2007)	19
<i>In re Atmel Corp. Deriv. Litig.</i> , No. C 06-4592 JF (HRL), 2008 WL 2561957 (N.D. Cal. June 25, 2008)	17
<i>In re Brocade Comm'n Sys., Inc. Deriv. Litig.</i> , 615 F. Supp. 2d 1018 (N.D. Cal. 2009)	20
<i>In re Coinstar Inc. Sec. Litig.</i> , No. C11-133 MJP, 2011 WL 4712206 (W.D. Wash. Oct. 6, 2011)	6
<i>In re Convergent Techs. Sec. Litig.</i> , 948 F.2d 507 (9th Cir. 1991)	8
<i>In re Finisar Corp. Deriv. Litig.</i> , No. C-06-07660 RMW, 2012 WL 2873844 (N.D. Cal. July 12, 2012)	17
<i>In re Galena Biopharma, Inc. Sec. Litig.</i> , 117 F. Supp. 3d 1145 (D. Or. 2015)	15

1	<i>In re Gilead Scis. Sec. Litig.</i> , 536 F.3d 1049 (9th Cir. 2008)	4
2	<i>In re Maxwell Techs., Inc. Sec. Litig.</i> , 18 F. Supp. 3d 1023 (S.D. Cal. 2014).....	14
3	<i>In re Netflix, Inc. Sec. Litig.</i> , 923 F. Supp. 2d 1214 (N.D. Cal. 2013).....	15
4	<i>In re Oracle Corp. Sec. Litig.</i> , 627 F.3d 376 (9th Cir. 2010)	8
5	<i>In re Questcor Sec. Litig.</i> , No. SA CV 12-01623 DMG, 2013 WL 5486762 (C.D. Cal. Oct. 1, 6 2013)	14
7	<i>In re Sagent Tech., Inc., Deriv. Litig.</i> , 278 F. Supp. 2d 1079 (N.D. Cal. 2003).....	20
8	<i>In re Tibco Software</i> , No. C 05-2146 SBA, 2006 WL 1469654 (N.D. Cal. May 25, 2006)	7, 8
9	<i>In re Verisign, Inc. Deriv. Litig.</i> , 531 F. Supp. 2d 1173 (N.D. Cal. 2007)	19
10	<i>Janus Capital Group, Inc. v. First Derivative Traders</i> , 564 U.S. 135 (2011).....	5, 6, 8
11	<i>Johnson v. Aljian</i> , 490 F.3d 778 (9th Cir. 2007).....	15
12	<i>Makor Issues & Rights, Ltd. v. Tellabs, Inc.</i> , 437 F.3d 588 (7th Cir. 2006).....	7
13	<i>Metzler Inv. GMBH v. Corinthian Colleges, Inc.</i> , 540 F.3d 1049 (9th Cir. 2008)	passim
14	<i>Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Resource Dev. Servs., Inc.</i> , No. C 10-01324 RS, 15 2011 WL 13153239 (N.D. Cal. Dec. 7, 2011).....	20
16	<i>Oregon Pub. Emps. Ret. Fund v. Apollo Grp. Inc.</i> , 774 F.3d 598 (9th Cir. 2014)	passim
17	<i>Police Ret. Sys. of St. Louis v. Intuitive Surgical, Inc.</i> , 759 F.3d 1051 (9th Cir. 2014).....	9
18	<i>Police Ret. Sys. of St. Louis v. Intuitive Surgical, Inc.</i> , No. 10-CV-03451-LHK, 2012 WL 19 1868874 (N.D. Cal. May 22, 2012)	14
20	<i>Retail Wholesale & Dep't Store Union Local 338 Ret. Fund v. Hewlett-Packard Co.</i> , 845 F.3d 21 1268 (9th Cir. 2017).....	8, 10
22	<i>Reese v. BP Expl. (Alaska) Inc.</i> , 643 F.3d 681 (9th Cir. 2011)	7
23	<i>Ronconi v. Larkin</i> , 253 F.3d 423 (9th Cir. 2001).....	12
24	<i>S. Ferry LP, No. 2 v. Killinger</i> , 542 F.3d 776 (9th Cir. 2008).....	13
25	<i>Sanford v. MemberWorks, Inc.</i> , 625 F.3d 550 (9th Cir. 2010)	17
26	<i>SEC v. Daifotis</i> , No. C 11-00137 WHA, 2011 WL 3295139 (N.D. Cal. Aug. 1, 2011)	6
27		
28		

1	<i>Shaev v. Baker</i> , Case No. 16-cv-05541-JST, 2017 WL 1735573 (N.D. Cal. May 4, 2017)	1, 12, 14, 16
2	<i>Silicon Graphics Inc. Sec. Litig.</i> , 183 F.3d 970 (9th Cir. 1999)	15
3	<i>Silverberg v. Gold</i> , C.A. No. 7646-VCP, 2013 WL 6859282 (Del. Ch. Dec. 31, 2013).....	17
4	<i>Southland Secs. Corp. v. INSpire Ins. Solutions, Inc.</i> , 365 F.3d 353 (5th Cir. 2004).....	7
5	<i>Stoneridge Inv. Partners, LLC v. Scientific-Atlanta</i> , 552 U.S. 148 (2008)	5
6	<i>Swartz v. KPMG LLP</i> , 476 F.3d 756 (9th Cir. 2007)	4
7	<i>Tellabs, Inc. v. Makor Issues & Rights, Ltd.</i> , 551 U.S. 308 (2007)	12
8	<i>Thomas v. Magnachip Semiconductor Corp.</i> , 167 F. Supp. 3d 1029 (N.D. Cal. 2016)	6, 15
9	<i>TSC Indus., Inc. v. Northway, Inc.</i> , 426 U.S. 438 (1976)	9
10	<i>Winer Family Trust v. Queen</i> , 503 F.3d 319 (3rd Cir. 2007)	7
11	<i>Zoumboulakis v. McGinn</i> , Case No. 5:13-CV-02379-EJD, 2014 WL 3926565 (N.D. Cal. Aug. 7, 2014)	19

STATE CASES

15	<i>Guttman v. Huang</i> , 823 A.2d 492 (Del. Ch. 2003)	17
16	<i>In re Oracle Corp. Deriv. Litig.</i> , 867 A.2d 904 (Del. Ch. 2004)	17
17	<i>Rattner v. Bidzos</i> , No. Civ. A 19700, 2003 WL 22284323 (Del. Ch. Sept. 30, 2003)	18

OTHER AUTHORITIES

20	15 U.S.C.A. § 78u-4(b).....	5
21	15 U.S.C. § 78t-1(a)	15
22	15 U.S.C. § 78u-4(b)(2)	11
23	28 U.S.C. § 1367(c)(3).....	16
24	California Corporations Code § 25402	4, 17, 19, 20
25	Fed. R. Civ. P. 9(b)	4, 17, 19

Defendant Carrie Tolstedt respectfully submits this Memorandum of Points and Authorities in support of her motion to dismiss the Consolidated Amended Verified Stockholder Derivative Complaint (the “Complaint”) in part, with respect to her.

INTRODUCTION

Plaintiffs have filed a massive, 596-paragraph, 181-page Complaint lodging eleven causes of action against 20 individual defendants. Weeding through this morass to determine which causes of action are adequately pleaded against which defendants is no simple feat. But focusing on one of those 20 defendants, Carrie Tolstedt, makes plain that the majority of the claims asserted are not pleaded sufficiently with respect to her. Ms. Tolstedt is one of only two defendants who was not a director, who is not alleged to have signed SEC filings, and who, save for in a few very limited instances, did not make public statements to investors. She traded the least of any of the executives highlighted in the Complaint and did so on a regular schedule. Perhaps for these reasons, the Complaint includes very few specific allegations about Ms. Tolstedt. These scant allegations are insufficient to meet the elevated pleading standards of the majority of the causes of action Plaintiffs have chosen to bring, almost all of which require particularity if not an even greater level of detail. In particular, the securities fraud, insider trading, and contribution causes of action are not viable as to Ms. Tolstedt. Those claims should therefore be dismissed for the reasons set forth below.

BACKGROUND

On May 4, 2017, the Court granted in part and denied in part the motion to dismiss on demand futility grounds of nominal defendant Wells Fargo & Company (“Wells Fargo”). *Shaev v. Baker*, Case No. 16-cv-05541-JST, 2017 WL 1735573 (N.D. Cal. May 4, 2017). In determining whether Plaintiffs were excused from making a demand on the Wells Fargo Board of Directors, that Order addressed the Directors’ potential liability, finding that the Complaint plausibly alleged that a majority of the Board consciously disregarded their duties to monitor or oversee Wells Fargo. *Id.* at *10, 15. This motion does not seek to relitigate that Order; it instead focuses on the inadequacy of the Complaint with respect to one of the 20 individual defendants: Carrie Tolstedt. Because the Court has already discussed in detail the Complaint’s lengthy allegations in its May 4, 2017 Order, this section focuses on those allegations specific to Carrie Tolstedt and relevant to this motion.

CARRIE TOLSTEDT'S MOTION TO DISMISS
LEAD CASE NO. 3:16-CV-05541-JST

1 Carrie Tolstedt was the Senior Executive Vice President in charge of Community Banking at
 2 Wells Fargo from 2007 to 2016. Compl. ¶ 72. Neither during that period, nor at any other time, was
 3 Ms. Tolstedt a member of the Wells Fargo Board of Directors. Ms. Tolstedt did not sign quarterly
 4 reports, annual reports, proxy statements, or other submissions to the Securities and Exchange
 5 Commission identified in the Complaint. There is no allegation that she spoke during quarterly
 6 earnings calls or at investor conferences other than Wells Fargo's biennial Investor Day. Indeed,
 7 according to the Complaint, she rarely addressed investors directly. Her public statements to the
 8 market were largely limited to a presentation on Community Banking every other year at Wells
 9 Fargo's Investor Day conference. *See id.* ¶¶ 332, 350, 363.

10 The Complaint attributes only three of the alleged misstatements in its 181 pages to Ms.
 11 Tolstedt. Each of these statements occurred during an Investor Day presentation. Specifically, the
 12 Complaint alleges that Ms. Tolstedt made the following statements:

- 13 • **2012 Investor Day Presentation:** “I believe that cross-sell model is more important than it
 14 has ever been before. With the current headwinds, it's more difficult for retail bank
 15 households with only one or two products to be profitable. We build our products with that in
 16 mind, offering packages to customers to provide more value. The good news is, even though
 17 we've been at this for a very long time, we still have some distance from achieving our goal of
 18 8 cross-sells, which we estimate to be an over \$5 billion revenue opportunity even in lower
 19 interest rate environment. On the upper right-hand, you can see that customers with greater
 20 cross-sell and tenure continue to purchase products from us. Currently, our customers hold
 21 around 6; the East is 5.5. We know that 8 cross sells can be done. Already, our best region is
 22 approaching a goal of 7.5.” *Id.* ¶ 332.
- 23 • **2014 Investor Day Presentation:** Ms. Tolstedt allegedly stated that Wells Fargo's cross
 24 selling strategy was “helping [its] customers succeed financially and meet[] all of their needs.”
 25 She also stated:
 - 26 ○ “The beneficial cycle of cross-sell continues. The more products the customers have
 27 with us, the better deal and greater value we can provide. . . . Our retail bank household
 28 cross-sell is now at 6.17 products, up from two years ago 5.98, and at the time of the

1 merger we were at 5.2. Our long-term goal continues to be an average cross-sell of 8
 2 and achieving this goal will come with higher household purchase rates and growth in
 3 profitability.”

4 ○ “Together, the density and cross-sell model drive revenue. . . We are bullish on cross-
 5 sell, we are confident on cross-sell, and we still believe that we can get to an eight
 6 cross-sell.” *Id.* ¶ 350.

7 • **2016 Investor Day Presentation:** Ms. Tolstedt allegedly stated that with respect to “products
 8 per household or cross-sell, the first thing we anchor ourselves on is our vision of satisfying
 9 our customers’ needs and helping them succeed financially,” and so “everything that we do is
 10 really about them.” *Id.* ¶ 363.

11 The Complaint includes few other specific allegations about Ms. Tolstedt’s activities during
 12 her tenure at Wells Fargo. It alleges she was responsible for approving store manager incentive plans,
 13 *id.* ¶ 147, and that other individuals within the Community Bank investigated complaints of sales
 14 integrity issues, *id.* ¶¶ 161-62, or responded to employee complaints, *id.* ¶ 206. It alleges that her
 15 compensation was based, in part, on Wells Fargo’s financial performance, including cross-sell goals.
 16 *Id.* ¶¶ 268-69. And it makes various allegations about statements made by others concerning her
 17 retirement. *Id.* ¶ 365.

18 Finally, the Complaint alleges that Ms. Tolstedt engaged in the purchase and sale of Wells
 19 Fargo stock during the relevant period. Specifically, she made 18 sales, on a fairly regular schedule,
 20 between January 2012 and July 2016 for a total of 2,482,857 shares. *Id.* ¶ 386. (This is the smallest
 21 number of sales by any of the so-called “insider selling defendants.” *See id.* ¶¶ 75, 383, 386, 388,
 22 390.) Between May 2014 and April 2015, Ms. Tolstedt also purchased 1,251,090 shares of Wells
 23 Fargo stock via the exercise of employee stock options. *Id.* ¶ 387. She sold the shares resulting from
 24 these exercises on the same day she acquired them. *Id.*

25 ARGUMENT

26 Plaintiffs have alleged nine causes of action against Ms. Tolstedt: breach of fiduciary duty
 27 (Count One); unjust enrichment (Count Two); breach of fiduciary duty for insider selling and
 28 misappropriation of information (Count Three); violations of section 10(b) of the Securities Exchange

1 Act and SEC Rule 10b-5 (Count Five); violations of section 20(A) of the Securities Exchange Act
 2 (Count Six); violations of section 29(b) of the Securities Exchange Act (Count Seven); violation of
 3 section 25402 of the California Corporations Code (Count Eight); and for contribution and
 4 indemnification (Count Eleven). Taking into account the Court's May 4, 2017 Order regarding the
 5 motion to dismiss on demand futility grounds, Ms. Tolstedt hereby moves to dismiss the federal
 6 securities causes of action (Counts Five, Six, and Seven), the state-law insider trading causes of action
 7 (Counts Three and Eight), and the contribution and indemnification claim (Count Eleven).

8 **I. LEGAL STANDARDS**

9 A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) should be granted if
 10 a complaint fails to plead sufficient facts to state a claim for relief "that is plausible on its face." *Bell*
 11 *Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). While courts must accept factual allegations in the
 12 complaint as true, they do not "accept as true allegations that are merely conclusory, unwarranted
 13 deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055
 14 (9th Cir. 2008).

15 For causes of action sounding in fraud, plaintiffs must meet the additional requirement to plead
 16 with particularity the circumstances constituting fraud. Fed. R. Civ. P. 9(b). Under Rule 9(b), a
 17 complaint must be dismissed if it does not include details regarding the "time, place, and specific
 18 content of the false representations as well as the identities of the parties to the misrepresentations."
 19 *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (citation and quotation omitted). "To comply
 20 with Rule 9(b), allegations of fraud must be specific enough to give defendants notice of the particular
 21 misconduct which is alleged to constitute the fraud charged so that they can defend against the charge
 22 and not just deny that they have done anything wrong." *Bly-Magee v. California*, 236 F.3d 1014, 1019
 23 (9th Cir. 2001) (citation and quotations omitted).

24 With respect to securities fraud claims, Rule 9(b) not only "applies to all elements," *Oregon*
 25 *Pub. Emps. Ret. Fund v. Apollo Grp. Inc.*, 774 F.3d 598, 605 (9th Cir. 2014), but the Private Securities
 26 Litigation Reform Act of 1995 ("PSLRA") mandates even higher pleading standards. Specifically, a
 27 complaint must "specify each statement alleged to have been misleading, the reason or reasons why
 28 the statement is misleading," and "state with particularity facts giving rise to a strong inference that the

1 defendant acted with the required state of mind.” 15 U.S.C.A. § 78u-4(b). Failure to meet these
 2 requirements requires dismissal. *Cement & Concrete Workers Dist. Council Pension Fund v. Hewlett*
 3 *Packard Co.*, 964 F. Supp. 2d 1128, 1137 (N.D. Cal. 2013) (Tigar, J.).

4 **II. THE SECURITIES CAUSES OF ACTION ARE INADEQUATELY PLEADED**

5 **A. The Complaint Fails To Allege Multiple Required Elements of a Section 10(b)
 6 Claim**

7 To survive a motion to dismiss a claim under Section 10(b) and Rule 10b-5, a plaintiff must
 8 allege with particularity “(1) a material misrepresentation or omission by the defendant; (2) scienter;
 9 (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4)
 10 reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.”

11 *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 157 (2008). The failure to meet the
 12 stringent pleading standards under the Federal Rules of Civil Procedure and the PSLRA as to any one
 13 of these elements requires dismissal of that claim. Here, the Complaint alleges no actionable
 14 misstatements on the part of Ms. Tolstedt. Nor does it allege facts sufficient to create a strong
 15 inference of scienter on the part of Ms. Tolstedt in making the alleged misstatements. Accordingly,
 16 the securities fraud cause of action must be dismissed as to Ms. Tolstedt.¹

17 **1. Ms. Tolstedt was the “maker” of only three alleged misstatements.**

18 The first element of a securities fraud claim is a “material misrepresentation or omission by the
 19 defendant.” *Stoneridge Inv. Partners*, 552 U.S. at 157 (emphasis added). Accordingly, when
 20 addressing an individual defendant, a threshold inquiry is which statements she should be deemed
 21 responsible for making. In *Janus Capital Group, Inc. v. First Derivative Traders*, the Supreme Court
 22 determined that a defendant is a “maker” of a statement only where she has “ultimate authority over
 23 the statement, including its content and whether and how to communicate it.” 564 U.S. 135, 142

24

25 ¹ A putative class action lawsuit asserting nearly identical securities fraud claims, arising from
 26 essentially the same conduct, against Ms. Tolstedt and other defendants is also pending before this
 27 Court. *See Hefler v. Wells Fargo & Co.*, Case No. 3:16-cv-05479-JST (N.D. Cal.). Responses to the
 28 Consolidated Class Action Complaint in that matter are due June 19, 2017. *See id.*, Order To Set
 Briefing Schedule (May 3, 2017) [Dkt. 90]. Should the Court dismiss the federal securities claims in
Hefler for any reason—including on grounds not raised in this brief—that decision should apply
 equally to this action.

1 (2011). Typically “attribution within a statement or implicit from surrounding circumstances is strong
 2 evidence that a statement was made by—and only by—the party to whom it is attributed.” *Id.* at 142-
 3 43. Although *Janus* focused on outside advisors, it has been widely interpreted to apply equally to
 4 corporate insiders. *See, e.g., Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 425 (7th Cir.
 5 2016); *see also In re Coinstar Inc. Sec. Litig.*, No. C11-133 MJP, 2011 WL 4712206, at *10 (W.D.
 6 Wash. Oct. 6, 2011).

7 Under *Janus*, even high-ranking corporate officers can be liable only for those statements for
 8 which they themselves were ultimately responsible. *Glickenhaus*, 787 F.3d at 428. In *Glickenhaus*,
 9 for example, the Seventh Circuit found that the executive in charge of a business unit in which
 10 employees were engaging in predatory lending practices that were a source of the company’s alleged
 11 misrepresentations could be held liable only for the statements he personally delivered to the public.
 12 *Id.* at 426-29. That court specifically disagreed with plaintiffs’ argument that the executive could be
 13 held liable for any statement that he reviewed and approved because of his position within the
 14 company. *Id.* at 428. Although the Ninth Circuit has yet to opine on this issue, numerous courts
 15 within this district have held that directors or corporate officers may be liable only for statements
 16 publicly attributed to them. *See, e.g., City of Royal Oak Ret. Sys. v. Juniper Networks, Inc.*, 880 F.
 17 Supp. 2d 1045, 1071 (N.D. Cal. 2012) (finding Board Chairman could be held liable only for
 18 statements he signed); *Curry v. Hansen Med., Inc.*, No. C 09-5094 CW, 2012 WL 3242447, at *4-5
 19 (N.D. Cal. Aug. 10, 2012) (dismissing claim against executive to whom no allegedly fraudulent
 20 statement was attributed); *SEC v. Daifotis*, No. C 11-00137 WHA, 2011 WL 3295139, at *2-4 (N.D.
 21 Cal. Aug. 1, 2011) (distinguishing between statements “made” by corporate insiders and statements
 22 not attributed to them); *cf. Thomas v. Magnachip Semiconductor Corp.*, 167 F. Supp. 3d 1029, 1047-
 23 48 (N.D. Cal. 2016) (Tigar, J.) (specific allegations that defendants signed SEC filings were sufficient
 24 under *Janus*).

25 Here, the Complaint alleges that Ms. Tolstedt made only three purported misstatements: one at
 26 the Wells Fargo Investor Day conference for each of 2012, 2014, and 2016. *See* Compl. ¶¶ 332, 350,
 27 363. It does not allege that she signed SEC filings, spoke during investor calls, presented at other
 28 investor conferences, or otherwise made public representations to investors. Nor does it make any

1 specific allegation that she somehow had ultimate authority over any such statements, despite not
 2 having uttered or signed them. Accordingly, the three statements from the Investor Day conferences
 3 represent the full extent of Ms. Tolstedt's potential individual liability under section 10(b).

4 Plaintiffs attempt to avoid this conclusion by invoking the "group pleading doctrine." Compl.
 5 ¶ 404-05. They generally allege, without more, that *all twenty-one* defendants (presumably including
 6 nominal defendant Wells Fargo) "participated in the drafting, preparation, or approval of the various
 7 shareholder and investor reports and other communications concerning Wells Fargo identified in this
 8 Complaint," and that *all twenty-one* defendants, "because of their positions of control and authority as
 9 officers or directors of Wells Fargo, were able to and did control the content of the various SEC
 10 filings, press releases, and other public statements pertaining to the Company." *Id.* Such vague claims
 11 are not pleaded with particularity, and do not pass muster under either the PSLRA or *Janus*.

12 Indeed, although the Ninth Circuit has not specifically addressed the question, numerous courts
 13 within the Ninth Circuit have recognized that the group pleading doctrine did not survive the passage
 14 of the PSLRA. *See In re Am. Apparel, Inc. S'holder Litig.*, No. CV 10-06352 MMM (JCGx), 2013 WL
 15 174119, at *25 (C.D. Cal. Jan. 16, 2013) (collecting cases). The Courts of Appeals to have considered
 16 the issue concur. *See Winer Family Trust v. Queen*, 503 F.3d 319, 337 (3rd Cir. 2007); *Makor Issues*
 17 & *Rights, Ltd. v. Tellabs, Inc.*, 437 F.3d 588, 602-03 (7th Cir. 2006) *overruled on other grounds by*
 18 *Tellabs*, 551 U.S. 308 (2007); *Southland Secs. Corp. v. INSPire Ins. Solutions, Inc.*, 365 F.3d 353, 365
 19 (5th Cir. 2004) ("Consistent with our rejection of the 'group pleading' doctrine, we do not construe
 20 allegations contained in the Complaint against the 'defendants' as a group as properly imputable to
 21 any particular individual defendant").

22 Even if the group pleading doctrine were still viable post-PSLRA, however, Plaintiffs would
 23 nonetheless be required to satisfy the particularity requirements of the PSLRA. *See In re Tibco*
 24 *Software, Inc.*, No. C 05-2146 SBA, 2006 WL 1469654, at *27 (N.D. Cal. May 25, 2006). And the
 25 Ninth Circuit has recognized that *Janus* "sets the pleading bar even higher in private securities fraud
 26 actions seeking to hold defendants primarily liable for the misstatements of others." *Reese v. BP Expl.*
 27 *(Alaska) Inc.*, 643 F.3d 681, 694 n.8 (9th Cir. 2011). Even before *Janus*, conclusory, non-specific
 28 allegations that all defendants "participated in the drafting, preparation, or approval of the various

1 shareholder and investor reports and other communications,” Compl. ¶ 404, or that they “were able to
 2 and did control the content of the various SEC filings, press releases, and other public statements,” *id.*
 3 ¶ 405, would not pass muster under the PSLRA. *See In re Tibco Software*, 2006 WL 1469654, at *27.
 4 It is clear that post-*Janus*, one who allegedly participates in the drafting or preparation of reports or
 5 other communications, and can “merely suggest what to say,” but lacks “ultimate authority” is not the
 6 maker of those statements. *See Janus*, 564 U.S. at 142 (“One who prepares or publishes a statement
 7 on behalf of another is not its maker.”).

8 For these reasons, Ms. Tolstedt’s potential liability is limited to the three statements the
 9 Complaint attributes to her.

10 **2. The Complaint fails to allege an actionable misrepresentation by Ms.
 11 Tolstedt.**

12 None of the statements the Complaint alleges Ms. Tolstedt made is an actionable
 13 misrepresentation. An alleged misrepresentation is not actionable unless it is both misleading and
 14 material. *Retail Wholesale & Dep’t Store Union Local 338 Ret. Fund v. Hewlett-Packard Co.*
 15 (hereinafter *Retail Wholesale*), 845 F.3d 1268, 1274 (9th Cir. 2017). To demonstrate that a statement
 16 is misleading, plaintiffs must show “that a particular statement, when read in light of all the
 17 information then available to the market, or a failure to disclose particular information, conveyed a
 18 false or misleading impression.” *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 390 (9th Cir. 2010)
 19 (quoting *In re Convergent Techs. Sec. Litig.*, 948 F.2d 507, 512 (9th Cir. 1991)). Statements can be
 20 misleading only if they are “capable of objective verification.” *Oregon Pub. Emps. Ret. Fund*, 774
 21 F.3d at 606. Defendants must state with particularity not only what the alleged misstatement is, but
 22 why it is misleading. *Retail Wholesale*, 845 F.3d at 1274. Indeed, one of the PSLRA’s goals in
 23 requiring such specificity is to “prevent[] a plaintiff from skirting dismissal by filing a complaint laden
 24 with vague allegations of deception unaccompanied by a particularized explanation stating why the
 25 defendant’s alleged statements or omissions are deceitful.” *Metzler Inv. GMBH v. Corinthian
 26 Colleges, Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008). A statement is not material unless it “would have
 27 been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information
 28 made available.” *Cement & Concrete Workers Dist. Council Pension Fund*, 964 F. Supp. 2d at 1138

1 (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

2 Instances of corporate “puffing”—“expressions of opinion” and other “vague statements of
 3 optimism like ‘good,’ ‘well-regarded,’ or other feel good monikers”—cannot constitute material
 4 misrepresentations as a matter of law. *Oregon Pub. Emps. Ret. Fund*, 774 F.3d at 606; *see also Retail*
 5 *Wholesale*, 845 F.3d at 1275-77. This is because such statements are neither “capable of objective
 6 verification,” nor are investors likely to rely upon such “mildly optimistic, subjective assessment[s].”
 7 *Oregon Pub. Emps. Ret. Fund*, 774 F.3d at 606.

8 The majority of quotes the Complaint attributes to Ms. Tolstedt are corporate “puffing”:
 9 “expressions of opinion,” “vague statements of optimism,” or “subjective assessment[s].” *See id.*
 10 Certain portions of these statements are forward-looking expressions of optimism regarding Wells
 11 Fargo’s ability to increase its sales per household. *See Compl.* ¶ 332 (“[W]e still have some distance
 12 from achieving our goal of 8 cross-sells, which we estimate to be an over \$5 billion revenue
 13 opportunity even in lower interest rate environment.”); *id.* (“We know that 8 cross sells can be done.”);
 14 *id.* ¶ 350 (“Our long-term goal continues to be an average cross-sell of 8 and achieving this goal will
 15 come with higher household purchase rates and growth in profitability.”); *id.* (“Together, the density
 16 and cross-sell model drive revenue. . . . We are bullish on cross-sell, we are confident on cross-sell,
 17 and we still believe that we can get to an eight cross-sell.”). Such subjective assessments of future
 18 performance are “the antithesis of facts.” *Police Ret. Sys. of St. Louis v. Intuitive Surgical, Inc.*, 759
 19 F.3d 1051, 1060 (9th Cir. 2014); *see also Oregon Pub. Emps. Ret. Fund*, 774 F.3d at 606-07 (finding
 20 statements that were “subjective and preceded by qualifiers, such as ‘we believe’” were “inherently
 21 subjective ‘puffing’ and would not induce the reliance of a reasonable investor”).

22 Other portions of Ms. Tolstedt’s statements are vague references to the value Wells Fargo
 23 seeks to provide its customers. *See Compl.* ¶ 332 (“With the current headwinds, it’s more difficult for
 24 retail bank households with only one or two products to be profitable. We build our products with that
 25 in mind, offering packages to customers to provide more value.”); *id.* (“[Y]ou can see that customers
 26 with greater cross-sell and tenure continue to purchase products from us.”); *id.* ¶ 350 (Wells Fargo was
 27 “helping [its] customers succeed financially and meet[] all of their needs.”); *id.* (“The beneficial cycle
 28 of cross-sell continues. The more products the customers have with us, the better deal and greater

1 value we can provide.”); *id.* ¶ 363 (“[T]he first thing we anchor ourselves on is our vision of satisfying
 2 our customers’ needs and helping them succeed financially.”); *id.* (“[E]verything that we do is really
 3 about [customers].”). These statements are akin to “aspirational” representations regarding “what
 4 actions are preferable, as opposed to [implications] that all staff, directors, and officers always adhere
 5 to . . . aspirations.” *See Retail Wholesale*, 845 F.3d at 1276. The Ninth Circuit has recently confirmed
 6 such statements are not actionable. *See id.* And since none of these statements is objectively
 7 verifiable, none is a proper basis for securities fraud liability.

8 Although the Complaint arguably alleges that Ms. Tolstedt made three representations that are
 9 capable of objective verification, it does not explain with particularity *why* these statements are false.
 10 The statements that fall within this category are, for 2012: “Currently, our customers hold around 6
 11 [products per household]; the East is 5.5,” Compl. ¶ 332; “Our best region is approaching a goal of 7.5
 12 [products per household],” *id.*; and for 2014: “Our retail bank household cross-sell is now at 6.17
 13 products, up from two years ago 5.98, and at the time of the merger we were at 5.2,” *id.* at ¶ 350. To
 14 demonstrate falsity, the Complaint generally alleges that, over the course of an unspecified time
 15 period, “[t]he ‘retail bank household cross-sell’ metrics disclosed in the quarterly and annual filings,
 16 which ranged from 5.79 to 6.17, were artificially inflated because Wells Fargo employees were
 17 fraudulently opening millions of unauthorized checking accounts, credit cards, and other accounts and
 18 services.” *Id.* at 368(a).

19 Such an allegation is not the “particularized explanation” of falsity mandated by the PSLRA.
 20 *Metzler Inv. GMBH*, 540 F.3d at 1061. The Complaint does not connect the alleged unauthorized
 21 account opening with “how and why” Ms. Tolstedt’s statements were allegedly false. *See id.* At best,
 22 the Complaint alleges an aggregate number of accounts that “might have been unauthorized” over the
 23 span of 2011 to 2015. Compl. ¶ 255. It never claims that Wells Fargo restated or otherwise
 24 disavowed its cross-sell metrics (and Wells Fargo did not). It provides no information about how
 25 cross-sell metrics were calculated, the effect that the opening of a checking or credit card account had
 26 on those figures, or whether an unused account would be included in such calculations. It does not
 27 allege how many fraudulent accounts were purportedly created in any given year, or how that number
 28 compared to the number of unproblematic accounts. Although the Complaint relies on a plethora of

1 allegations regarding the opening of unauthorized accounts, it alleges no facts that would tend to show
 2 the figures Ms. Tolstedt recited specific to 2012 and 2014 were false.

3 Under a similar set of facts, the Ninth Circuit held in *Metzler Investments* that allegations of a
 4 “company-wide scheme to inflate enrollment figures” by a for-profit college operator were insufficient
 5 to demonstrate that factual statements about the company’s financial status were false. 540 F.3d at
 6 1056, 1070. That complaint included a wealth of allegations about the alleged fraudulent conduct,
 7 including that employees engaged in a widespread scheme of “manipulating student enrollment by
 8 counting students not yet enrolled,” “manipulating or falsifying student grades to maintain federal
 9 funding eligibility,” “delaying notification to federal officials of dropped students,” and “manipulating
 10 job placement data in order to satisfy federal and state regulatory requirements,” such that “as many as
 11 50% to 60% of the people . . . represented to the U.S. government as being qualified, attending
 12 ‘students’ were either ‘no shows’ in class or unqualified for admission and federal funds from the
 13 outset.” *Id.* at 1055. Despite this alleged pervasive fraud, the Ninth Circuit affirmed dismissal of
 14 plaintiffs’ securities fraud claims for failure to connect the allegations to the company’s purportedly
 15 false statements regarding its financial situation. *Id.* at 1070. In other words, that complaint could not
 16 survive a motion to dismiss because the “explanation of the how and why the statements were false
 17 [was] decidedly vague.” *Id.*

18 The same result is warranted here. Without information about how, in 2012 and 2014, alleged
 19 unauthorized account creation translated into purportedly false cross-sell metrics recited by Ms.
 20 Tolstedt, the Complaint has not stated with particularity *why* Ms. Tolstedt’s statements were
 21 misleading. The Complaint therefore fails to allege an actionable misstatement attributable to Ms.
 22 Tolstedt.

23 **3. The Complaint does not support a “strong inference” of scienter as to Ms.
 24 Tolstedt’s statements.**

25 As explained, the PSLRA mandates that securities fraud plaintiffs “state with particularity facts
 26 giving rise to a *strong inference* that the defendant acted with the required state of mind.” 15 U.S.C. §
 27 78u-4(b)(2) (emphasis added). To meet this requirement, a complaint must allege “specific
 28 contemporaneous statements or conditions that demonstrate the intentional or the deliberately reckless

1 false or misleading nature of the statements *when made.*" *Metzler Inv. GMBH*, 540 F.3d at 1066
 2 (quoting *Ronconi v. Larkin*, 253 F.3d 423, 432 (9th Cir. 2001)) (emphasis added). It must allege
 3 scienter with particularity as to each individual defendant. *Oregon Pub. Emps. Ret. Fund*, 774 F.3d at
 4 607. “[I]n determining whether the pleaded facts give rise to a ‘strong’ inference of scienter, the court
 5 must take into account plausible opposing inferences”—including those unfavorable to plaintiffs.
 6 *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 323 (2007); *see also Metzler Inv. GMBH*,
 7 540 F.3d at 1061. It must also consider the facts alleged “collectively.” *Tellabs*, 551 U.S. at 322-23.

8 Even if the statements the Complaint attributes to Ms. Tolstedt were actionable, the Complaint
 9 fails to allege with specificity facts that would create a “strong inference” that Ms. Tolstedt knew or
 10 should have known, in 2012 and 2014, that the cross-sell figures she stated publicly were false. To be
 11 sure, this Court found in its May 4, 2017 Order that the Complaint plausibly alleged that the director
 12 defendants acted consciously in failing to oversee and monitor Wells Fargo. *Shaev*, 2017 WL
 13 1735573, at *10-15. But the same result is not warranted with respect to Ms. Tolstedt in connection
 14 with the securities fraud claim for three reasons. First, as explained, when analyzing a securities-fraud
 15 claim, the Court is not required to make all inferences in favor of Plaintiffs; it must take competing
 16 inferences into account. *See Metzler Inv. GMBH*, 540 F.3d at 1061. Second, the Complaint makes
 17 almost no specific references to Ms. Tolstedt’s knowledge. And third, the Complaint does not
 18 plausibly allege that Ms. Tolstedt spoke with knowledge that Wells Fargo’s cross-sell figures were
 19 false in 2012 and 2014. It is this allegation—not that Ms. Tolstedt had some general knowledge of
 20 inappropriate sales practices—that would be required to properly allege scienter on the part of Ms.
 21 Tolstedt with respect to her alleged misstatements.

22 The allegations that certain defendants purportedly knew or should have known that some
 23 instances of inappropriate sales behavior had occurred within Wells Fargo’s bank branches over a
 24 number of years never attribute knowledge directly to Ms. Tolstedt, relying upon the reader to make
 25 such an inference. But this is not permissible under the heightened pleading requirements of the
 26 PSLRA. In the absence of specific allegations regarding Ms. Tolstedt’s knowledge, the inference that
 27 she was not aware of certain information is equally plausible. Indeed, the Ninth Circuit has
 28 recognized that “[w]here a complaint relies on allegations that management had an important role in

1 the company but does not contain additional detailed allegations about the defendants' actual exposure
 2 to information, it will usually fall short of the PSLRA standard." *S. Ferry LP, No. 2 v. Killinger*, 542
 3 F.3d 776, 784-85 (9th Cir. 2008).

4 For example, the Complaint alleges that Wells Fargo had within its systems information about
 5 "[a]ctions taken on Wells Fargo computers by employees" and "[i]nformation about customer
 6 accounts," such that "Defendants" could have monitored the accounts opened by each employee every
 7 day. Compl. ¶¶ 148-150. But it does not allege that Ms. Tolstedt monitored these individual computer
 8 systems or had knowledge of the information Plaintiffs suppose was contained there. The more
 9 plausible inference is that she, as a high-ranking executive, would not have reviewed the records of
 10 individual account openings by the Community Bank's 100,000 employees. In the absence of an
 11 allegation that specific information was conveyed to an individual, the mere existence of computer
 12 monitoring systems does not create a "strong" inference of knowledge. *See Metzler Inv. GMBH*, 540
 13 F.3d at 1067-68.

14 Likewise, the Complaint alleges that Wells Fargo's EthicsLine tracked complaints regarding
 15 sales practices since at least 2008, Compl. ¶ 159, but it does not provide any facts as to the number of
 16 complaints, nor is there any allegation that Ms. Tolstedt received any reports aggregating these
 17 complaints. The Complaint alleges that individuals reported inappropriate behavior directly to John
 18 Stumpf and to the Board, but it includes no allegation that Ms. Tolstedt received direct complaints.
 19 *See id.* ¶¶ 196-211. The Complaint alleges that the task of addressing complaints was assigned to Ms.
 20 Tolstedt's group in 2012, Compl. ¶ 161, and that this group found evidence of "simulated funding" in
 21 two markets in 2013, *id.* ¶ 162, but it does not suggest that Ms. Tolstedt was kept apprised of the
 22 investigation, or provide any figures that would suggest that the scope of simulated funding was large
 23 enough to call into question the cross-sell metrics. Likewise, allegations regarding the complaints
 24 identified by the *Los Angeles Times* and individual lawsuits do not state that Ms. Tolstedt was aware
 25 of this information. Of course, these allegations permit an inference that Ms. Tolstedt was aware that
 26 *some* inappropriate sales activities were occurring, particularly following the publication of the *Los*
 27 *Angeles Times* article. But the Court must take into account other plausible inferences—including that
 28 some of this information, such as one-off, individual complaints not addressed to her, may not have

1 reached Ms. Tolstedt or that she, as a non-attorney executive, would not have been aware of lawsuits
 2 filed prior to the highly publicized Los Angeles City Attorney suit in 2015. At bottom, the Complaint
 3 does not plausibly allege that Ms. Tolstedt was aware of all of the “red flags” the Court found were
 4 plausibly alleged with respect to the directors. *See Shaev*, 2017 WL 1735573, at *10-15.

5 More importantly, the allegations do *not* permit the inference that whatever knowledge of
 6 inappropriate sales practices Ms. Tolstedt had in 2012 or 2014 rose to a level that would make her
 7 aware that the cross-sell figures she presented to the public were false. Critically, the Complaint does
 8 not allege that an investigation into the quantity of accounts that “might have been unauthorized”
 9 began until August 2015—more than a year after the most recent-in-time alleged statement by Ms.
 10 Tolstedt regarding cross-sell metrics. Compl. ¶¶ 253-56. The quantity of any unauthorized accounts
 11 is a critical pre-condition to the alleged falsity of the aggregate figures presented by Ms. Tolstedt. As
 12 explained above, the Complaint includes no allegation as to *why* the cross-sell figures uttered by Ms.
 13 Tolstedt were false at the time they were made. Nor does it allege facts that permit a “strong
 14 inference” that Ms. Tolstedt *knew or should have known* that such figures were false.

15 The allegation that Ms. Tolstedt’s compensation provides the basis for a “strong inference” of
 16 scienter fares no better. *See* Compl. ¶ 263. The Complaint alleges that one of many considerations
 17 factoring into Ms. Tolstedt’s compensation was the success of Wells Fargo, including achieving its
 18 cross-sell goals. *Id.* ¶¶ 268-69. But the Ninth Circuit has held that without more, “evidence of a
 19 personal profit motive on the part of officers and directors . . . is insufficient to raise a strong inference
 20 of scienter.” *Glazer Capital Mgmt., LP v. Magistri*, 549 F.3d 736, 748 (9th Cir. 2008). Other courts
 21 within this Circuit have specifically applied that reasoning to performance-based compensation. *See*,
 22 *e.g.*, *In re Maxwell Techs., Inc. Sec. Litig.*, 18 F. Supp. 3d 1023, 1044-45 (S.D. Cal. 2014) (“[I]f the
 23 existence of performance-based compensation and motive to increase short-term profits were enough
 24 to establish scienter, scienter could be found for almost any executive.”); *In re Questcor Sec. Litig.*,
 25 No. SA CV 12-01623 DMG, 2013 WL 5486762, at *19 (C.D. Cal. Oct. 1, 2013) (“Because incentive
 26 compensation packages are common, however, this fact alone cannot raise an inference of scienter.”);
 27 *Police Ret. Sys. of St. Louis v. Intuitive Surgical, Inc.*, No. 10-CV-03451-LHK, 2012 WL 1868874, at
 28 *23 (N.D. Cal. May 22, 2012), *aff’d*, 759 F.3d 1051 (9th Cir. 2014) (“[T]he sheer fact that Defendants

1 had performance-based compensation packages does not support an inference of scienter.”). Thus,
 2 Ms. Tolstedt’s compensation is not a proper basis for a finding of a “strong inference” of scienter.²

3 For all of these reasons, the securities fraud cause of action is inadequately pleaded as to Ms.
 4 Tolstedt, and must be dismissed.

5 **B. Claims under Sections 20A and 29(b) Are Both Derivative of the Securities Fraud
 6 Claim and Otherwise Inadequately Pledged**

7 **1. The Complaint fails to plead an independent violation or contemporaneous
 8 trades, as required under Section 20A.**

9 To state a claim under Section 20A, plaintiffs must allege (1) a violation of a substantive
 10 provision of the Exchange Act, (2) a contemporaneous sale or purchase of securities by the plaintiff
 11 and the defendant, and (3) “possession of material, nonpublic information.” 15 U.S.C. § 78t-1(a).
 12 The Complaint fails to plead either the primary violation or contemporaneous sale/purchase
 13 requirement.

14 As a preliminary matter, “[c]laims under Section 20A are derivative and therefore require an
 15 independent violation of the Exchange Act.” *Johnson v. Aljian*, 490 F.3d 778, 781 (9th Cir. 2007). For
 16 the reasons explained above, the Complaint fails adequately to plead a primary violation by Ms.
 17 Tolstedt. This fact alone warrants dismissal of the Section 20A claim. *See, e.g., Oregon Pub. Emps.
 18 Ret. Fund*, 774 F.3d at 610; *In re Netflix, Inc. Sec. Litig.*, 923 F. Supp. 2d 1214, 1226 (N.D. Cal. 2013).

19 Second, the Complaint fails to allege that Wells Fargo, on whose behalf Plaintiffs purport to
 20 sue, made trades that were contemporaneous with Ms. Tolstedt’s. The Ninth Circuit has not set forth a
 21 specific definition of “contemporaneous” trading, and courts within the Circuit have reached varying
 22 conclusions as to the window of time that constitutes a “contemporaneous” trade, spanning from one
 23 day to several. *See, e.g., Thomas*, 167 F. Supp. 3d 1029, 1049 (N.D. Cal. 2016) (finding trading on the
 24 day after to be sufficient); *In re Galena Biopharma, Inc. Sec. Litig.*, 117 F. Supp. 3d 1145, 1204 (D.

25
 26 ² To the extent Plaintiffs attempt to allege scienter based on Ms. Tolstedt’s trading activities,
 27 that effort must also fail. The Complaint makes no allegation that Ms. Tolstedt’s stock sales were
 28 “suspicious” or “dramatically out of line with [her] prior trading practices at times calculated to
 maximize the personal benefit.” *See Metzler Inv. GMBH*, 540 F.3d at 1066-67 (quoting *Silicon
 Graphics Inc. Sec. Litig.*, 183 F.3d 970, 986 (9th Cir. 1999), superceded by statute on other grounds).

1 Or. 2015) (observing that “district courts within the Ninth Circuit require trades ranging from one day
 2 to up to eight days” and collecting cases). Here, the Complaint’s allegations are too general even to
 3 permit such an analysis. Rather, the Complaint alleges only that Wells Fargo purchased a certain
 4 number and dollar value of shares during various months. Compl. ¶ 316. These allegations are
 5 inadequate to show that Wells Fargo’s trades were contemporaneous with Ms. Tolstedt’s.
 6 Accordingly, and for this independent reason, the Section 20A claim must be dismissed.

7 **2. The Complaint fails to plead an independent violation or a contract, as
 8 required under Section 29(b).**

9 Similar to Section 20A, and as the Court correctly observed in its May 4, 2017 Order, “Section
 10 29(b) itself does not define a substantive violation of the securities laws; rather, it is the vehicle
 11 through which private parties may rescind contracts that were made or performed in violation of other
 12 substantive provisions.” *Shaev*, 2017 WL 1735573, at *20 (quoting *In re Asyst Techs., Inc. Derivative
 13 Litig.*, No. C-06-04669 EDL, 2008 WL 4891220, at *9 (N.D. Cal. Nov. 12, 2008)). Thus, because the
 14 Complaint has not stated a claim for securities fraud as to Ms. Tolstedt, the Section 29(b) cause of
 15 action must likewise be dismissed.

16 The Section 29(b) claim should also be dismissed for the independent reason that the
 17 Complaint fails to identify to which contract or contracts it seeks to rescind respect to Ms. Tolstedt.
 18 Instead, it alleges that “Defendants violated provisions of the Exchange Act while performing their
 19 duties arising under various employment and other contracts they entered into with Wells Fargo.”
 20 Compl. ¶ 574. The vague reference to “various employment and other contracts” is insufficient to
 21 provide Ms. Tolstedt with notice as to what the Complaint is asserting. As such, she is not in a
 22 position to defend against the claim that her performance under an unspecified contract was in
 23 violation of the federal securities laws. This cause of action is inadequately pleaded even under the
 24 more forgiving requirements of Federal Rule of Civil Procedure 8, and should therefore be dismissed.

25 **III. THE STATE-LAW CLAIMS SHOULD BE DISMISSED**

26 For the reasons stated, all of the federal causes of action against Ms. Tolstedt should be
 27 dismissed. If that occurs, the Court should exercise its discretion and decline to exercise supplemental
 28 jurisdiction over the remaining state-law claims. *See* 28 U.S.C. § 1337(c)(3). Factors including

1 “judicial economy, convenience, fairness, and comity” counsel in favor of this result. *See Sanford v.*
 2 *MemberWorks, Inc.*, 625 F.3d 550, 561 (9th Cir. 2010) (quoting *Carnegie-Mellon Univ. v. Cohill*, 484
 3 U.S. 343, 350 n.7 (1988)). Indeed, a parallel derivative action raising the same state-law claims is
 4 currently pending in California Superior Court. *See In re Wells Fargo & Co. Derivative Litig.* Lead
 5 Case No. CGC-16-554407 (Cal. Super. Ct.). If the Court chooses to retain jurisdiction over the state-
 6 law causes of action, however, three of the claims against Ms. Tolstedt should be dismissed.

7 **A. The State Law Insider Trading Claims Are Inadequately Pleading**

8 Plaintiffs bring two state-law insider trading claims: for alleged breach of fiduciary duty under
 9 Delaware law, and for alleged violation of California Corporations Code § 25402.³ Because insider
 10 trading is a fraudulent practice, Plaintiffs must plead these claims with particularity under Rule 9(b).
 11 *See In re Atmel Corp. Deriv. Litig.*, No. C 06-4592 JF (HRL), 2008 WL 2561957, at *14 (N.D. Cal.
 12 June 25, 2008).

13 **1. The Complaint fails to allege scienter, as required under Delaware law.**

14 To state a claim for insider trading under Delaware law, Plaintiffs must plead that “(1) the
 15 corporate fiduciary possessed material, nonpublic company information; and (2) the corporate
 16 fiduciary used that information improperly by making trades because she was motivated, wholly or in
 17 part, by the substance of that information.” *See In re Finisar*, No. C-06-07660 RMW, 2012 WL
 18 2873844, at *20 (N.D. Cal. July 12, 2012) (quoting *In re Oracle Corp. Deriv. Litig.*, 867 A.2d 904,
 19 934 (Del. Ch. 2004)). Simply alleging that Ms. Tolstedt sold stock while in possession of material,
 20 nonpublic information is not sufficient to survive a motion to dismiss. The Complaint must also show
 21 that she “consciously acted to exploit” any information she possessed. *See Guttman v. Huang*, 823
 22 A.2d 492, 505 (Del. Ch. 2003). Such a showing is typically made by alleging that the timing or
 23 amount of particular trades raises an inference of conscious exploitation. *See Silverberg v. Gold*, C.A.
 24 No. 7646-VCP, 2013 WL 6859282, at *14 (Del. Ch. Dec. 31, 2013) (analyzing whether “requisite
 25 scienter reasonably can be inferred from the timing and size of [Directors’] stock sales”).

26

27

 28 ³ Because Wells Fargo is incorporated in Delaware, Delaware law applies to the breach of
 fiduciary duty claim. *See In re Finisar Corp. Deriv. Litig.*, No. C-06-07660 RMW, 2012 WL
 2873844, at *19 (N.D. Cal. July 12, 2012).

1 The Complaint comes nowhere near the showing required to state an insider trading claim
 2 under Delaware law. It is wholly devoid of particularized allegations that Ms. Tolstedt sold Wells
 3 Fargo stock because she was motivated by the substance of any nonpublic information. The only
 4 allegations in the Complaint related to Ms. Tolstedt's motivations are conclusory: that she "sold Wells
 5 Fargo common stock on the basis of" nonpublic information, *see* Compl. ¶ 542, or that she used
 6 nonpublic information "for [her] own benefit when [she] sold Wells Fargo common stock," *see*
 7 Compl. ¶ 543. These are not facts, and under any pleading standard, much less the heightened
 8 pleading standard that applies to insider trading claims, the Court should disregard them.

9 The only other section of the Complaint related to Ms. Tolstedt's stock sales does nothing
 10 more than list the instances in which Ms. Tolstedt sold Wells Fargo stock between January 2012 and
 11 July 2016. It does not allege that the timing or amount of any stock sale was suspicious. *See* Compl.
 12 ¶¶ 386-87. To the contrary, the allegations reveal that rather than time her sales for maximum benefit,
 13 Ms. Tolstedt sold stock on a regular schedule. For instance, she sold stock on March 15 in 2012,
 14 2013, 2014, 2015, and 2016; on July 1 in 2012, 2013, and 2014; and on July 22 in 2015 and 2016. *Id.*

15 Delaware law compels dismissal of insider trading claims that "fail[] to allege any facts with
 16 particularity that would permit [the Court] to draw a reasonable inference that the challenged sales
 17 were executed upon the basis and because of non-public information." *Rattner v. Bidzos*, No. Civ. A
 18 19700, 2003 WL 22284323, at *12 (Del. Ch. Sept. 30, 2003). This is equally so when the Complaint
 19 "does not assist in determining whether the pattern of executed trades was the product of an
 20 orchestrated scheme to defraud the market and the Company's shareholders or good faith adherence to
 21 Company policy or consistent with prior individual practices." *Id.*

22 The claim for breach of fiduciary duty based on insider trading fails here for these exact
 23 reasons. The Complaint alleges no particularized facts demonstrating that Ms. Tolstedt sold Wells
 24 Fargo stock "upon the basis and because of" any nonpublic information, and it alleges no details
 25 regarding the timing of Ms. Tolstedt's sales that would raise an inference of improper motivation. If
 26 anything, the timing of Ms. Tolstedt's sales demonstrates that she did not deviate from her usual
 27 practice during the Relevant Period. The Delaware insider trading claim should be dismissed.

2. The California insider trading claim is not pleaded with particularity.

Plaintiffs fare no better with their insider trading claim under California Corporations Code § 25402. That statute makes it unlawful for officers of an issuer of stock to “purchase or sell any security of the issuer . . . at a time when [she] knows material information about the issuer . . . which would significantly affect the market price of that security and which is not generally available to the public.” Cal. Corp. Code § 25402. “[A]s insider trading under California law is a fraudulent practice,” a claim pursuant to this provision must be pled with particularity under Federal Rule of Civil Procedure 9(b). *See In re Verisign, Inc. Deriv. Litig.*, 531 F. Supp. 2d 1173, 1221 (N.D. Cal. 2007).

While the language of the statute is broad, California courts have made clear that in order to state a valid claim, a plaintiff must do more than generally allege that an officer knew of material, nonpublic information at the time she made a trade. They must explain exactly which facts “each of the selling defendants knew, when each knew of those facts, how they acquired the knowledge, or which sales were made when defendants were in possession of which inside information.” *See id.*

As detailed above, Plaintiffs have not pleaded their insider trading claim with particularity. They have made no attempt to allege which facts Ms. Tolstedt knew during particular stock sales. Instead, their allegations related to her stock sales consist only of a list of each sale, and conclusory allegations that she made those sales on the basis of nonpublic information. That does not satisfy the heightened pleading standard that applies to Section 25402 claims. *See In re Atmel Corp. Deriv. Litig.*, No. C 06-4592 JF (HRL), 2007 WL 2070299, at *11 (N.D. Cal. July 16, 2007) (dismissing Section 25402 claim because it was “not pled with sufficient particularity”). Moreover, Plaintiffs’ failure to allege that any of Ms. Tolstedt’s stock sales deviated from her previous practice provides an additional ground for dismissal. *See Zoumboulakis v. McGinn*, Case No. 5:13-CV-02379-EJD, 2014 WL 3926565, at *12 (N.D. Cal. Aug. 7, 2014) (dismissing Section 25402 claim because plaintiff failed to allege sales were “made due to alleged insider information” or “unusual from previous trading practices”).

In sum, Plaintiffs have not pleaded their insider trading claims with particularity, and have failed to raise sufficient facts to permit an inference that Ms. Tolstedt sold stock on the basis of

1 material, nonpublic information. The claims should be dismissed.⁴

2 **B. The Contribution and Indemnification Claims Are Not Ripe**

3 Finally, the claim for contribution and indemnification “in the event [Wells Fargo] is found
 4 liable for violating the federal securities laws” must be dismissed because it is not ripe. *See Compl. ¶*
 5 595. Plaintiffs contend that if Wells Fargo is held liable in a separate suit alleging violations of federal
 6 securities laws, that liability will arise in part because of the alleged acts or omissions of Ms. Tolstedt,
 7 and thus Wells Fargo is entitled to contribution or indemnification from her. *See id.* But contribution
 8 and indemnification claims are not ripe until liability in the underlying suit has been finally
 9 determined. *See In re Brocade Comm’ns Sys., Inc. Deriv. Litig.*, 615 F. Supp. 2d 1018, 1049 (N.D.
 10 Cal. 2009) (“As there is no final judgment in that case, the claim for contribution is not ripe and is
 11 hereby dismissed”); *see also Nat’l Union Fire Ins. Co. of Pittsburgh, PA v. Resource Dev. Servs.,*
 12 *Inc.*, No. C 10-01324 RS, 2011 WL 13153239, at *6 (N.D. Cal. Dec. 7, 2011) (dismissing contribution
 13 claim as unripe because final judgment had not been entered in underlying action). Because the
 14 federal securities suit against Wells Fargo is ongoing and no judgment has been entered, Plaintiffs’
 15 contribution and indemnification claims are not ripe and should be dismissed.

24
 25 ⁴ In addition, the Section 25402 claim should be dismissed because it is barred by the internal
 26 affairs doctrine. *See Edgar v. MITE Corp.*, 457 U.S. 624, 645-46 (1982); *In re Sagent Tech., Inc.*,
 27 *Deriv. Litig.*, 278 F. Supp. 2d 1079, 1092 (N.D. Cal. 2003). Indeed, the California Superior Court
 28 recently dismissed identical claims in the parallel state derivative action on the ground that Section
 25402 does not apply to derivative actions brought on behalf of foreign corporations. *See In re Wells*
Fargo & Co. Deriv. Litig., Lead Case No. CGC-16-554407, slip op. at 12 (Cal. Super. Ct. May 10,
 2017).

CONCLUSION

For the foregoing reasons, Carrie Tolstedt's partial motion to dismiss should be granted and the claims against her discussed herein should be dismissed.

DATED: June 5, 2017

Respectfully submitted,

/s/

JEFFREY E. FAUCETTE
SKAGGS FAUCETTE LLP

WILLIAMS & CONNOLLY LLP
ENU MAINIGI (*pro hac vice*)
LESLIE COOPER VIGEN (*pro hac vice*)

Attorneys for CARRIE TOLSTEDT